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No. 91-1820

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In the Supreme Court of the United States

OCTOBER TERM, 1992

PLUMBERS AND PIPEFITTERS LOCAL UNION NO. 520, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND CATALYTIC, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably deferred to a pre-arbitration settlement agreement reached between the employer and the grieving employee's collective bargaining representative.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alpha Beta Co., 273 N.L.R.B. 1546 (1985), aff'd *sub nom. Mahon* v. *NLRB*, 808 F.2d 1342 (9th Cir. 1987)	6, 11, 12
American Freight System, Inc. v. *NLRB*, 722 F.2d 828 (D.C. Cir. 1983)	9, 11
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	11
Catalytic, Inc., 212 N.L.R.B. 471 (1974)	2
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11
Metropolitan Edison Co. v. *NLRB*, 460 U.S. 693 (1983)	9, 10
NLRB v. *City Disposal Systems, Inc.*, 465 U.S. 822 (1984)	9
Olin Corp., 268 N.L.R.B. 573 (1984)	7
Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955)	7
United States Postal Service, 300 N.L.R.B. No. 23 (1990)	6, 11, 14, 15
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	12

Statutes:

National Labor Relations Act, 29 U.S.C 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4, 6
§ 8(a)(3), 29 U.S.C. 158(a)(3)	4, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a88-a113) is reported at 955 F.2d 744. The decision and order of the National Labor Relations Board (Board) (Pet. App. a46-a87), including the decision and recommended order of the administrative law judge (ALJ) (Pet. App. a1-a45), is reported at 301 N.L.R.B. No. 44.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. The petition for a writ of cer-

tiorari was filed on May 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Catalytic, Inc. (Catalytic) is an engineering contractor that performs maintenance services for industrial plants and utilities. Catalytic's craft employees are covered by a collective bargaining agreement known as the General President's Project Maintenance Agreement (GPPMA).[1] The GPPMA is negotiated on a nationwide basis; its signatories are fourteen international building trade unions and several engineering contractors, including Catalytic. Pet. App. a48-a49, a91. With the exception of wage rates, certain benefit packages, and hiring hall practices (all of which are negotiated by local unions), the national agreement covers most conditions of employment for craft employees in the designated bargaining units. *Id.* at a91. The local unions are not signatories to the GPPMA; each local, however, is affiliated with one of the signatory international unions. The local unions monitor compliance with the terms of the GPPMA, while the affiliated international union is the recognized bargaining representative for the employees in the designated local bargaining units. *Ibid.* Petitioner, Plumbers and Pipefitters Local Union No. 520 (Local 520), is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (United Association), a signatory to the GPPMA. *Id.* at a49, a91.

[1] The GPPMA is designed to take account of the unique circumstances facing contractors like Catalytic, which operate a number of temporary projects at various work sites. See *Catalytic, Inc.*, 212 N.L.R.B. 471, 471-472 (1974) (describing history and function of GPPMA).

In August 1985, Philadelphia Electric Company (PECO) decided to remove and repair the "snubbers" (large shock absorbers) at its Peach Bottom nuclear power plant in Delta, Pennsylvania. PECO awarded Catalytic the removal work, but the associated repair work was given to another contractor because of PECO's dissatisfaction with certain work previously done by Catalytic's pipefitters. Pet. App. a50, a92. Local 520, however, believed that PECO should also have assigned the repair work to its pipefitters. *Ibid.* On Thursday, August 29, Catalytic informed Garland Berry, the Local 520 steward at the Peach Bottom plant, that the snubber removal work would be performed in two four-man shifts (rather than the customary one eight-man shift) beginning the following Tuesday, September 3. *Id.* at a50-a51, a92. On Friday, August 30, Berry, on the advice of August Hartinger (Local 520's business manager), directed the eight pipefitters to report for the morning shift as usual on September 3. *Id.* at a51, a92. When asked, Berry told one of the workers to take his directions from Local 520, not from Catalytic. *Ibid.*

Over the weekend, Neal Greeley (Catalytic's labor relations manager at the Peach Bottom plant), Frank DeLuca (United Association's Pennsylvania representative), and Hartinger had telephone conversations to discuss Berry's actions. DeLuca agreed that the shift would be split as Catalytic had directed, and Greeley agreed to hold a meeting to discuss Catalytic's decision to award the repair work to another contractor. The pipefitters accordingly reported for work in two shifts on September 3, as Catalytic had originally directed. Pet. App. a52-a53, a93.

On September 13, Catalytic discharged Berry for gross insubordination, based upon his August 30 directive countermanding its instructions as to the

shift split. Pet. App. a53-a54, a93. On the same day, Local 520 filed a grievance over Berry's discharge, asserting that Catalytic had discharged Berry without proper cause. In addition, on September 18, Local 520 filed an unfair labor practice charge with the Board alleging that Catalytic had discharged Berry for engaging in protected union activity, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3) and (1). Pet. App. a1, a93.

The GPPMA establishes a four-step grievance and arbitration procedure. Step One consists of a meeting between the aggrieved employee and/or a representative from the local union and the employee's immediate supervisor. If the grievance is not resolved at Step One, it proceeds to Step Two. At that step, a representative of the local and a representative of the affiliated international union consult with the employer's labor relations manager. If Step Two is unsuccessful, the grievance is referred at Step Three to a panel known as the General Presidents' Committee (GPC). The GPC consists of representatives from each of the GPPMA signatory international unions; there are no employer representatives on the GPC. At Step Three, representatives from the employer and the international union responsible for the grievance may make oral and written presentations to the GPC. If the GPC and the employer cannot agree on the disposition of the grievance, either the employer or the international union may invoke Step Four of the process: binding arbitration. Pet. App. a54-a55, a94.

Berry's grievance was not resolved at Step One. In October 1985, Hartinger, DeLuca, and Berry met with United Association officials to prepare for Step Two. Hartinger explained Local 520's position to Ed

Moore, the United Association's assistant general president, and Moore called David McIntire, Catalytic's vice president, in an unsuccessful attempt to resolve the grievance. Pet. App. a55-a56, a45. Shortly thereafter, the Step Two meeting was held in Washington, D.C. DeLuca, Moore, Greeley, and McIntire discussed Berry's grievance in detail but did not resolve it. *Id.* at a56-a57. The United Association then initiated Step Three by referring Berry's grievance to the GPC for consideration during its mid-January 1986 meeting. *Id.* at a57.

At the GPC meeting, Greeley presented Catalytic's position and submitted a written statement; Frank Coyne, the United Association's representative on the GPC, presented Berry's case, submitted a written statement, and requested that Berry be reinstated with backpay. Pet. App. a13-a14, a95. On January 31, 1986, the GPC decided that Berry "should be made eligible for immediate rehire without any backpay." *Id.* at a58. Catalytic and the United Association both accepted the GPC's resolution, deeming it final and binding. Pet. App. a58-a59. Hartinger and Berry, however, insisted that Catalytic reinstate Berry with full backpay (rather than simply make him eligible for immediate rehire). *Id.* at a59. Hartinger thus urged the United Association to take the grievance to Step Four—binding arbitration. The United Association, however, declined because the GPC had agreed on a solution at Step Three. *Id.* at a15, a96. Catalytic subsequently rehired Berry.[2]

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[2] The record is unclear when Berry was rehired. The ALJ found that Berry was rehired "several months" after the GPC's January 31, 1986, decision. Pet. App. a34. The ALJ also stated, however, that Berry was rehired in April 1987. *Id.* at a15.

2. On January 30, 1987, the Board's General Counsel issued an unfair labor practice complaint against Catalytic. The ALJ found that Catalytic and the United Association had settled the grievance at Step Three by accepting the GPC's resolution, Pet. App. a30-a31, but he refused to defer to that settlement since Berry and Local 520 had objected to it. *Id.* at a37. On the merits, the ALJ found that Catalytic had discharged Berry for his activity as a union steward, and not for gross insubordination, in violation of Section 8(a)(3) and (1).[3] *Id.* at a28, a38. Accordingly, the ALJ recommended that the Board order Catalytic to reinstate Berry with backpay. *Id.* at a40-a41.

The Board, with one Member dissenting, rejected the ALJ's deferral ruling. The Board reiterated its policy established in *Alpha Beta Co.*, 273 N.L.R.B. 1546 (1985), aff'd *sub nom. Mahon* v. *NLRB*, 808 F.2d 1342 (9th Cir. 1987), and *United States Postal Service*, 300 N.L.R.B. No. 23 (1990), of applying "the deferral principle of *Spielberg* and *Olin* to settlement agreements between the employer and the authorized bargaining representative that were reached during contractual grievance and arbitration proceedings, short of a final and binding arbitration award, even though the employee grievan[t] opposed the settlement."[4] Pet.

[3] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. 158(a)(3) and (1).

[4] Under its *Spielberg/Olin* policy, the Board will defer to an arbitral award where the arbitrator's decision is not repugnant to the purposes and policies of the Act, the arbitration procedures are fair and regular, the parties have agreed to be bound

App. a62-a63 (footnotes omitted). The Board rejected the ALJ's refusal to defer on the basis that Local 520 and Berry had objected to the settlement. The Board pointed out that the United Association, not Local 520, was Berry's bargaining representative and the United Association had approved the settlement. Pet. App. a66. The Board also rejected the view of the dissenting Board Member, *id.* at a75, that deferral under *Alpha Beta* and *Postal Service* was not appropriate because the resolution of Berry's grievance did not constitute a settlement, bu simply constituted a decision by the United Association not to take a grievance to arbitration. The Board determined that the United Association and Catalytic had reached a "mutually satisfactory resolution of the grievance through resort to the agreed-on grievance machinery" and that the resolution was "tantamount to a settlement agreement." *Id.* at a66.[5]

The Board then concluded that all four of the *Spielberg/Olin* criteria (see note 4, *supra*) for deferring to a settlement agreement were met here. First, the Board found that the grievance procedures were "fair and regular." Pet. App. a70. Second, it concluded that "all parties had agreed to be bound" by the process. *Id.* at a70-a71. Third, the Board found that the settlement was not "'repugnant' to the purposes and policies of the Act." *Id.* at a71. Even though the

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by the award, and the unfair labor practice issue was adequately considered by the arbitrator. See *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

[5] The Board noted that under Catalytic's policy, absent the settlement entitling Berry to "immediate rehire," Catalytic "was not *required* to rehire Berry" on the PECO project and would have assessed his eligibility for rehire on an annual basis. Pet. App. a58 n.4.

settlement did not give Berry all the relief he thought he deserved (and would have received had he prevailed before the Board), the Board explained that deferral does not require total consistency with Board precedent, but is available unless the award is "palpably wrong." *Id.* at a71-a72. The Board concluded that the settlement here was not "palpably wrong," noting that it "involved a compromise, with both sides making concessions and with Berry being made eligible for immediate rehire." *Id.* at a72. Fourth, the Board found that the unfair labor practice issue had been "adequately considered" because "the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice issue." *Id.* at a73. Accordingly, in light of its analysis of the settlement agreement, the Board dismissed the unfair labor practice complaint. *Id.* at a74.

3. The court of appeals denied Local 520's petition for review and upheld the Board's decision. The court concluded that the Board's policy of affording deference to pre-arbitration settlement agreements under *Alpha Beta* and *Postal Service* is a permissible construction of the Act. Pet. App. a99. The court stated that, "[b]y recognizing the validity and finality of settlements, the Board promotes the integrity of the collective bargaining process, thereby effectuating a primary goal of the national labor policy." *Id.* at a102-a103. The court also determined that the Board did not abuse its discretion in deferring to the settlement agreement involved here, as "the record contains substantial evidence to support the Board's conclusion that each criterion [of the *Alpha Beta/Postal Service* policy] has been met." *Id.* at a103.

While sustaining the Board's decision in this case, the court of appeals also criticized the Board's theory for deference in its *Alpha Beta/Postal Service* line of cases, and articulated an alternative rationale for a deference policy. Citing the reasoning in *American Freight System, Inc.* v. *NLRB*, 722 F.2d 828 (D.C. Cir. 1983), the court indicated that it would always be appropriate for the Board to defer to a union's grievance settlement that implicates the category of "waiveable" statutory rights, as long as the settlement proceedings are fair and the union complies with its duty of fair representation.[6] The court questioned whether the "palpably wrong" prong of the Board's test would afford adequate standards to justify the invalidation of such a settlement. Pet. App. a109-a111. But because Local 520 did not challenge the validity of the Board's policy, and because the court's approach produced the same outcome as that of the Board in the present context (*i.e.*, the right in question was "waiveable"),[7] the court did not disturb the Board's ruling in this case. *Id.* at a112.

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[6] In *American Freight*, the court held that the Board had abused its discretion in failing to defer to the determination of a contract grievance committee that an employee's refusal to drive a truck was unjustified. The court reasoned that, whatever statutory right the employee may have had to refuse to drive a truck based on his "good faith" belief that it was unsafe (see *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822 (1984)), that right was waived by a provision of the collective bargaining agreement that provided that a refusal to operate equipment must be "justified." 722 F.2d at 833.

[7] Certain statutory rights may be altered or waived by a union, provided that the waiver does not breach the union's duty of fair representation or impair the selection of a bargaining representative. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983); Pet. App. a100. One of those rights is the right to strike, 460 U.S. at 705, and the court of appeals found that

ARGUMENT

1. Petitioner contends (Pet. 15-30) that the court of appeals erred in suggesting that the Board should defer to a grievance settlement whenever the right affected by the grievance settlement is "waiveable"; petitioner claims that this purported disagreement with the Board's *Spielberg/Olin* deferral policy creates a conflict with the decisions of other courts of appeals. Petitioner further argues (Pet. 31-34) that, in the context of this case, the court's finding that the right at issue was waived misapplies this Court's decision in *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983). Petitioner's contentions, which rest on a mischaracterization of the decision below, do not warrant this Court's review.

The court of appeals did not reject the *Spielberg/Olin* approach that the Board uses in deciding whether to defer to the settlement of a dispute through the collective process. Rather, the court held that "the Board's deference policy constitutes a permissible interpretation of the [National Labor Relations Act] and that the Board did not abuse its discretion by applying the policy in this case." Pet. App. a99. While the court limited its endorsement of that policy to the factual context presented, one in which "the statutory right implicated by the grievance is within the class of 'waiveable' rights," *id.* at a102, the court did not purport to impose its analytical model on the Board. Rather, the court upheld the Board's decision under the agency's *Alpha Beta/Postal Service* analysis, and further concluded that, since Berry's activity constituted the exercise of a

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an employee's right to tell unit employees to engage in a work stoppage by refusing to honor the employer's shift assignment is similarly waiveable. Pet. App. a100-a101.

"waiveable" right, "the result reached through the grievance procedure was, by definition, not 'palpably wrong' under the NLRA." Pet. App. a106-a107.

The court of appeals' proposed waiver analysis differs from the analysis articulated by the Board in its deferral decisions and applied in this case.[8] But that difference alone does not justify further review. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The court of appeals found that the Board properly applied its deferral standards and upheld the Board's order; moreover, the court stated that its waiver analysis, if applied here, would not affect the judgment in this case. Pet. App. a112. Accordingly, this decision does not present an appropriate vehicle for review of the court of appeals' waiver analysis. Likewise, it does not squarely present the issue of whether the court of appeals' conclusion that the right in question was "waived" was a proper application of *Metropolitan Edison*. Review of those issues,

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[8] Under the Board's analysis, the effect of a union's waiver of an employee's statutory right in settling his grievance is to bind the employee to that agreement despite his dissatisfaction with it, provided that the settlement is not palpably wrong under the Act, and the parties considered the unfair labor practice issue in settling the grievance. See *Alpha Beta Co.*, 273 N.L.R.B. at 1547; *Postal Service*, 300 N.L.R.B. No. 23, slip op. 7. By contrast, under the court of appeals' analysis, if the union is found to have validly waived a right protected by the Act, there is no longer any independent statutory right for the Board to vindicate. Therefore, it is unnecessary to determine whether the settlement is palpably wrong under the Act or whether the parties considered the unfair labor practice issue. See *American Freight System*, 722 F.2d at 832; Pet. App. a106-a107.

if required, can await a case in which their resolution will have an effect on the outcome.

2. Petitioner also contends (Pet. 35-44) that the Board misapplied its own standards in deferring to the parties' disposition of Berry's grievance. In *Alpha Beta Co.*, the Board ruled that the deferral principles set forth in *Spielberg* and *Olin* "apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes." 273 N.L.R.B. at 1547. Deferral to such settlements will occur when four criteria are satisfied.[9]

Petitioner does not challenge the Board's basic *Alpha Beta* approach, see Pet. App. a101, but insists that the policy was not properly applied on the particular facts presented. The court of appeals, however, correctly upheld the Board's findings that the parties' disposition of Berry's grievance was "tantamount to a settlement" and that deferral to that settlement was appropriate under *Alpha Beta*. Further review of those factbound determinations is not warranted, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, petitioner's claims lack merit.

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[9] As summarized by the court of appeals, "the Board will give deference to a pre-arbitration grievance settlement when: (1) the settlement is reached through a collective bargaining process which is 'fair and regular'; (2) the parties agreed to be bound by the terms of the settlement agreement; (3) the outcome reached is not 'palpably wrong,' * * *; and (4) the unfair labor practice was 'considered' in the settlement process, in that the contractual and unfair labor practice issues are factually parallel and both parties were generally aware of the relevant facts." Pet. App. a101.

a. Petitioner argues (Pet. 35-36) that the United Association's action at Step Three was not a "settlement" (which would trigger deferral analysis), but was "merely inaction" in the face of the opportunity to arbitrate Berry's grievance. Both the Board and the court of appeals, however, correctly rejected that characterization of the resolution reached by the parties. Pet. App. a66, a98. Petitioner's claim seems to be premised (Pet. 39-40) on the assumption that the United Association simply lost the grievance at Step Three, but failed to appeal the GPC's resolution to an arbitrator because of a general policy against appealing GPC decisions. That is incorrect.

As the Board found, Catalytic was under no obligation to rehire Berry. Nevertheless, as a result of the GPC's determination at Step Three, Catalytic agreed to make him immediately eligible for rehire. That disposition was a concession on Catalytic's part. Pet. App. a58-a59 n.4, a72. Accordingly, the United Association's decision to accept the GPC's resolution was "tantamount to a settlement," for it represented a compromise between the employer and the union: Catalytic gave up its right to exclude Berry from its employ in exchange for the United Association's foregoing its right to seek backpay for Berry. *Id.* at a65 n.10. The Board was therefore correct in finding that the resolution was effectively a settlement.

b. Petitioner further argues that the four criteria for deferral to a settlement (see note 9, *supra*) were not satisfied here. First, it asserts (Pet. 40-41) that the grievance procedure was not fair and regular within the meaning of the *Spielberg/Olin* standard because the United Association "put its own interests ahead of Berry's." The Board found, however, that the United Association had fairly and adequately

represented Berry's interests, and the court of appeals concurred in that determination. Pet. App. a70, a104-a105.

Second, petitioner claims (Pet. 41-42) that because Local 520 and Berry did not consent to or participate in the GPC procedures, and objected to the resolution they produced, they had not agreed to be bound by that settlement. But the "party" whose agreement was required was the United Association, which was Berry's bargaining representative. Pet. App. a105. Berry, by invoking the grievance process, authorized the United Association to settle his grievance. Petitioner does not dispute that an employee's collective bargaining representative can bind him or her to an agreement settling a grievance. See *Postal Service*, 300 N.L.R.B. No. 23, slip op. 6 & n.11; Pet. App. a63-a64 n.9, a71 n.14.

Third, petitioner asserts (Pet. 41-42) that the settlement here was repugnant to the Act because "Berry received no remedy at all." That assertion is incorrect; Berry received the right to be rehired, which Catalytic was not previously obligated to do. See note 5 *supra*. Moreover, to the extent that petitioner implies that the contractual process is required to produce the same remedy as the Board would give in order to pass muster, petitioner simply disagrees with the Board's deferral policy. That policy, however, is justified to encourage parties to rely on consensual means to resolve their disputes and to promote the integrity of the collective bargaining process. Pet. App. a102.

Fourth, petitioner contends (Pet. 41) that the issue underlying the unfair labor practice charge was not "presented" to the GPC. The Board's rule is that the statutory issue has been sufficiently considered in the collective process when the contractual issue and

the unfair labor practice issue are factually parallel and the parties were generally aware of the facts relevant to resolving the unfair labor practice. *Postal Service*, 300 N.L.R.B. No. 23, slip op. 7. Here, the issue under both the GPPMA and the Act was the same: whether Catalytic terminated Berry for gross insubordination, or for his activity as a union steward. Pet. App. a108. The Board found that the United Association and Catalytic were aware of the facts relevant to resolving this issue, *id.* at a73, and that they presented their respective positions to the GPC, *id.* at a57-a58. Accordingly, the matter was adequately considered by the GPC and the resolution of the grievance warranted deferral by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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